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No. 98-2057

In the
SUPREME COURT OF THE UNITED STATES

BRUCE NORTON, et ux.,
as parents of ALLAN NORTON, a minor,

Petitioners,

v.

ORINDA UNION SCHOOL DISTRICT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Was Allan Norton eligible for special education and related services as a pupil with a specific learning disability in fifth grade when he was enrolled in the Orinda Union School District?

PARTIES TO THE PROCEEDING

The Petitioners in this case are Bruce and Susan Norton, the parents of Allan Norton, and Allan Norton, a student enrolled in the Orinda Union School District at the time the administrative hearing was filed. Respondent is the Orinda Union School District, a California public school district.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Orinda Union School District respectfully submits this brief in opposition to Petitioners' Petition for Writ of Certiorari to review the decision of the Ninth Circuit Court of Appeals entered on February 25, 1999, and the Petition for Rehearing denied on March 25, 1999.

STATUTORY PROVISIONS INVOLVED

Respondent agrees that Petitioners' suit involves the Individuals with Disabilities Education Act, 20 U.S.C. section 1400 et seq., specifically sections 1401(3) and 1401(25), and implementing provisions of the California Education Code, specifically California Education Code sections 56026 and 56337.

RESPONDENT'S STATEMENT OF THE CASE

On May 19, 1995, an administrative hearing officer concluded that Allan Norton was not eligible for special education services under the Individuals with Disabilities Education Act ("IDEA") 20 U.S.C. section 1400 et seq. as a student with a specific learning disability when he was enrolled in the fifth grade at Sleepy Hollow School in the Orinda Union School District ("District"). The hearing officer concluded that Allan did not qualify as a student with a specific learning disability at that time because: (1) the evidence was inconclusive as to whether Allan had a severe discrepancy between his ability and achievement in either written language or mathematics calculation, and (2) Allan did not require

"special education," since he was making appropriate progress in his regular classes without special education services. (App. F 33-34.)

On appeal, the district court heard additional evidence from Vincent Nunno, Ph.D., a neuropsychologist hired by Allan's parents. In testifying about what "special education" accommodations Allan "needed," Dr. Nunno admitted that his recommendations were designed to "maximize" Allan's performance and that Allan was indeed "benefitting" from his regular education program, without special education. (App. E 34-35.) The district court affirmed the decision of the administrative hearing officer.

The Ninth Circuit Court of Appeals concurred. The court determined that Allan received an appropriate public education in the District's regular education program during the 1993-94 school year and that Allan was ineligible for IDEA protection at that time. (App. A-11.) The court concluded that the hearing officer's findings were careful and thorough and that IDEA protections are available only where modifications to the student's regular education program are ineffective. (App. A 9-11.)

This petition challenges the determination that Allan was not eligible for special education and related services under the IDEA. Petitioners assert that the administrative hearing officer inappropriately considered Allan's success in the regular education program when he denied Allan eligibility for special education, and suggests that whether a student is benefitting from the regular education program is irrelevant in eligibility determinations.

Petitioners seek to expand the class of qualified disabled individuals for purposes of IDEA protection to any student, regardless of his/her success in the regular education program.

Although all students might benefit from additional tutoring or specialized instruction, the IDEA was enacted to ensure access to public education to those children with specified disabilities who cannot benefit from instruction in regular education classes in their neighborhood schools. The IDEA was not designed to maximize a pupil's potential or to serve children who can benefit from the regular education program and do not require instruction by special education teachers or the use of specialized equipment, methodologies or techniques.

ARGUMENT

I. THIS CASE PRESENTS NO BASIS FOR SUPREME COURT REVIEW

The United States Supreme Court accepts for review only cases involving important federal questions with broad public policy implications. This case does not meet that test.

Rule 10 of the Rules of the Supreme Court of the United States sets forth specific reasons for which the Court will grant certiorari. None of the Rule 10 reasons applies here.

The petition in this case challenges a decision made by an administrative hearing officer that Allan Norton was not eligible for special education services in 1994, when he was in the fifth grade. That decision was affirmed by the district court

and the Ninth Circuit Court of Appeals. Neither of the court decisions are published in the official reports. In addition, the decision is not in conflict with any other courts of appeal. Rather, this petition merely challenges the findings of fact made by the administrative hearing officer and district court judge that were affirmed by the Ninth Circuit.

II. PETITIONERS' ARGUMENTS IN THEIR PETITION HAVE NO VALIDITY

To qualify for protection under the IDEA a pupil must be a "child with a disability" defined in 20 U.S.C. section 1401(3) as follows:

> The term "child with a disability" means a child –
> (i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (hereinafter referred to as "emotional disturbance") orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and
> (ii) who by reason thereof need special education and related services.

"Special education" means "specially designed instruction at no cost to parents to meet the unique needs of a child with a disability, including – (A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and (B) instruction in physical education." 20 U.S.C. section 1401(25).

California Education Code section 56031 defines "special education" as follows:

> "Special education" means specially designed instruction, at no cost to the parent, to meet the unique needs of individuals with exceptional needs, whose educational needs cannot be met with modification of the regular instruction program, and related services, at no cost to the parent, that may be needed to assist these individuals to benefit from specially designed instruction.

Thus, to be eligible for IDEA protection, Allan must have one of the enumerated disabilities and, as a result, need special education and related services in order to receive educational benefit.

In 1993, Allan's parents referred Allan for assessment to determine his eligibility for IDEA services. In response, District staff conducted an extensive psychoeducational assessment that included cognitive, academic and perceptual testing. As a result of the assessment, the District determined that Allan did not qualify for special education at that time. In part, that determination was made based on the results of academic testing that showed that Allan scored at or above the 8th grade level in reading, mathematics and spelling on the Wide Range Achievement Test (App. F-12) and one to seven years above his grade level in subtests on the Woodcock Johnson Test of Achievement. (App. F-13.)

Word Identification	10.7
Reading Comprehension	12.0

Mathematics Calculation	6.4
Applied Problems	10.8
Dictation	6.4
Writing Samples	6.3

Concerned that Allan was not achieving at his potential, Mr. and Mrs. Norton obtained private educational evaluations from Shirley Tretten, M.A., Deborah Sedberry, M.D., Violet Spraings, Ph.D., Paul Bogenberger, Gary Landman, M.D., and Arlee Maier, Ph.D., and filed for an administrative hearing to contest the District's denial of eligibility. (App. F 15-22.)

At the administrative hearing, the hearing officer considered whether Allan met the criteria for IDEA eligibility as a pupil with a specific learning disability. California law parallels 34 C.F.R. section 300.541, the federal regulation for determining whether a student is eligible for special education as a student with a specific learning disability. California Education Code section 56337 requires the following:

> A pupil shall be assessed as having a specific learning disability which makes him or her eligible for special education and related services when it is determined that all the following exist:
>
> (a) A severe discrepancy exists between the intellectual ability and achievement in one or more of the following academic areas:
>
> (1) Oral expression
> (2) Listening comprehension
> (3) Written expression

(4) Basic reading skills
(5) Reading comprehension
(6) Mathematics calculation
(7) Mathematics reasoning

(b) The discrepancy is due to a disorder in one or more of the basic psychological processes and is not the result of environmental, cultural, or economic disadvantages.

(c) The discrepancy cannot be corrected through other regular or categorical services offered within the regular instructional program.

After a six-day hearing and consideration of all of the new assessment information provided by Allan's parents, the hearing officer concluded that the "evidence was not convincing that Allan has a severe discrepancy between his ability and achievement on standardized tests." (App. F-33.) Applying the third prong of the eligibility criteria, the hearing officer then concluded that even if a discrepancy could be shown, Allan's educational problems could be addressed in the regular educational program "with relatively minor modifications." (App. F-34.) The hearing officer did not agree that Allan required the type of extensive modifications enumerated by the assessors who had evaluated Allan at his parents' request. (App. H 1-12.) Rather, the hearing officer's determination was based on testimony of Allan's fourth and fifth grade teachers that Allan performed at grade level or better on school work and did not require special education (App. F-35), the testimony of his Gifted and Talented Education ("GATE") teacher that Allan did "extremely well" in the GATE

program (App. F-35), a review of a group standardized achievement test in which Allan achieved substantially above his grade level as measured by national norms (App. F-34-35) and Allan's placement in high school classes in German, Physics and English Literature in sixth grade, when Allan's parents enrolled Allan in a private school. (App. F 34-36.)

In *Board of Education of the Hendrick Hudson Central Sch. Dist.* v. *Rowley*, 458 U.S. 176 (1982), the Supreme Court interpreted provisions of the IDEA including the meaning of "free appropriate public education," "special education" and "related services."
Id. at 188. Although the Court stated that the definition of a "free appropriate public education" tended toward the "cryptic rather than the comprehensive," *id.* at 188, no significant changes were made to the definition of any of these terms when the IDEA was reauthorized in 1997. Thus, *Rowley* continues to provide the best and most thorough discussion of what "special education" is, and by extension, what "special education" is not.

In *Rowley*, the parents of Amy Rowley, a deaf student, requested that her school district provide a sign language interpreter in all of her classes. *Id.* at 184. Although the district court and the court of appeals considered a sign language interpreter necessary for Amy to maximize her potential at school, *id.* at 185-86, the United States Supreme Court disagreed. The Court rejected the "maximum potential" standard and noted that Amy was receiving an "adequate education" without a sign language interpreter, using her excellent lip reading skills. *Id.* at 209-10. In denying the interpreter services the court stated: "Implicit in the

congressional purpose of providing access to a "free appropriate public education" is the requirement that the education "should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *Id.* at 204.

Applying this reasoning to eligibility decisions, if Allan was achieving passing marks and advancing from grade to grade without special education, and his learning weaknesses could be addressed though regular education modifications made by his regular education teachers, it is obvious that he was not eligible to receive special education services. To provide special education services when a child is already benefitting from the regular education program would establish a maximization standard, a standard specifically rejected by the Supreme Court in *Rowley*.

This principle was recently articulated in a trio of analogous cases issued by the Supreme Court in its last term: *Sutton* v. *United Airlines, Inc.*, 119 S. Ct. 2139 (1999), *Murphy* v. *United Parcel Service, Inc.*, 119 S. Ct. 2133 (1999), and *Albertson's Inc.* v. *Kirkingburg*, 119 S. Ct. 2133 (1999). In these cases the Supreme Court narrowed the scope of the Americans with Disabilities Act ("ADA") 42 U.S.C. section 12101 et seq., holding that the determination of whether an individual is disabled under the ADA should be made with reference to measures that mitigate the individual's impairment. Similarly, whether a child is a child with a disability under the IDEA should be made with reference to the regular education modifications available to the child in his/her classroom. If these mitigating measures are not adequate and the child has one of the enumerated disabilities, he/she is eligible for special education services.

Consideration of a child's success in the regular classroom program does not mean, as Petitioners suggest, that a pupil must fail before he/she is eligible for special education services, or that gifted children will be excluded from receiving special education services. The same eligibility criteria apply to all children. Although Petitioners argue that opinion letters issued by the U.S. Department of Education ("Department") preclude consideration of a pupil's success in his/her regular education classroom, the Department's opinions are consistent with the actions of the District and the findings on appeal.[1/] The letters merely state that gifted pupils cannot be excluded from consideration for special education services, and that whether a disabled child requires special education must be based on an individualized review of the child's unique needs.

In this case, the administrative hearing officer after six days of testimony and a review of many assessments, including five assessments submitted by the parents, could not conclude that a severe discrepancy existed between Allan's ability and achievement, the threshold requirement for a determination that

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[1/]Letters issued by the U.S. Department of Education interpreting Part B of the IDEA should be considered with reference to 20 U.S.C. section 1405 enacted by Congress in 1997, when it reauthorized the IDEA. In response to concerns that the Department was engaging in "rule making" without public comment, section 1405 now mandates that the Department follow specific procedures when issuing policy letters, answering questions and otherwise interpreting the IDEA. The Department may not establish rules through the use of policy letters, without first providing notice in the Federal Register and an opportunity for comment. In addition, policies of general applicability, must be widely disseminated. Finally, the Department must include in its policy letters a statement that its interpretations are not legally binding.

a pupil has a specific learning disability, as that term is defined for purposes of access to special education services under the IDEA. The dispute could have ended there. The hearing officer, however, determined that even if a severe discrepancy existed, Allan did not require special education services. (App. F-39.) His decision was based on a thorough and individualized review of Allan's need for special education by a team of professionals, including his parents, and consideration of Allan's performance on standardized assessments, the opinions of his teachers, samples of Allan's schoolwork, information from teacher observations and relevant information from his parents. Allan was not denied eligibility for special education because he was a gifted student, but because in fifth grade his educational needs could be met by his regular education teacher with the type of modifications that are routinely provided in regular education classes. Allan did not require special education.

CONCLUSION

The IDEA was enacted to provide remedial educational programming for qualified disabled children who cannot benefit from the regular education program without the provision of special education and related services. If a child can benefit from the regular education program with the type of modifications that can be implemented in regular education classrooms by regular education teachers, then the child is not eligible for IDEA services.

Although the District requested publication of the Ninth Circuit decision to provide guidance to school districts in making eligibility determinations, neither the district court nor

the court of appeals chose to publish its decision in the official reports. Since there are no decisions from other courts of appeals that are in conflict with the Ninth Circuit's decision, granting this petition is not necessary to resolve a split among the circuits. In addition, the administrative hearing officer and the courts below considered fully all of Petitioners' arguments, and no new cases, statutes or regulations offer a different analysis. The administrative hearing officer and the courts each concluded that Allan was not eligible for special education services under the IDEA. Since the case concerns primarily questions of evidence and factual findings as applied to the statutory definitions, review by the U.S. Supreme Court is not warranted.

The District therefore requests that the Court deny this Petition for a Writ of Certiorari.

Dated: July 20, 1999

Respectfully submitted,

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